

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION**

WILLIAM HENRY MICHELLETTI

MOVANT

V.

NO. 1:13CR50-MPM-DAS

UNITED STATES OF AMERICA

RESPONDENT

ORDER

Pending before the Court is “Defendant’s Motion to Withdraw as to Court’s Notification to Proceed Pursuant to 28 U.S.C. § 2255, and to Refile Pursuant to Fed. R. Crim. P., Rule 52(b),” which Movant filed pursuant to the Court’s warning that it intended to characterize his grievances regarding his conviction and sentence as a pleading under 28 U.S.C. § 2255. In the instant motion, Movant now requests that the Court consider his motion as one for relief based on plain error pursuant to Federal Rule of Criminal Procedure 52(b). However, Rule 52(b) of the Federal Rules of Criminal Procedure is applicable *on appeal*. See, e.g., *United States v. Frady*, 456 U.S. 152, 163 (1982) (“By its terms, recourse may be had to [Rule 52(b)] only on appeal[.]”). This Court has already informed Movant that it is not an appellate court, and that his motion for relief from his sentence is properly considered pursuant to § 2255. It has previously advised Movant that he may withdraw the motion or else proceed with the case under § 2255.

Inasmuch as the instant motion specifically asks the Court to “withdraw[] any and all actions pursuant to 28 U.S.C. § 2255,” the Court will grant that portion of Movant’s motion. The portion of Movant’s motion requesting to proceed pursuant to Rule 52(b), however, must be denied.

Accordingly, it is therefore **ORDERED**, that Movant's initial motion for relief from the allegedly unlawful sentence [34], which the Court construes as a motion for relief pursuant to 28 U.S.C. § 2255, be **DISMISSED WITHOUT PREJUDICE** based on Movant's request. It is **FURTHER ORDERED** that Movant's motion to proceed in this cause on a motion for relief pursuant to Rule 52(b) [36] be **DENIED** for the reasons set forth herein.

THIS, the 5th day of August, 2015.

/s/ Michael P. Mills
MICHAEL P. MILLS
U.S. DISTRICT JUDGE